Supreme Court, U.S.
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No.

In The

# Supreme Court of the United States

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Richard Drake

Petitioner

v.

Federal Aviation Administration

Respondent

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On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia

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## PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

Richard W. Drake
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Pro se

## QUESTIONS PRESENTED

**Statement:**

In 1993 the Petitioner (Richard Drake), a flight attendant for Delta airlines was accused of failing a government mandated DOT drug test because his sample allegedly contained an adulterant. Drake did not adulterate his sample and refused to resign. He was terminated.

Drake filed suit against Delta Airlines for various violations of the DOT drug testing regulations. The N.Y. Dist. Ct. ruled and the Appeals court affirmed that employees have no right of private action for violations of the Federal Random Drug Testing Program because they have a right under U.S.C. 46101(a) to obtain relief through a complaint to the FAA.

Drake unsuccessfully pursued this rout for relief and the DC Circuit ruled that employees have no right to relief under an APA claim or any other rights for relief under 46101(a), the very relief the 2nd Circuit claimed he did have.

In a report to Congressman Wolf, the DOT itself confirmed that under its drug testing program, 46101 offers no relief for employees. The DOT also stated that employees relief lies in civil action. Drake has been fighting for nine years, not to prove his innocence, but to have the right to have his case heard.

Question 1. Is the DOT Random Drug Testing Program in violation of Drake's Constitutional due process rights because it does not afford any due process or remedy for the violations of the testing regulations even though those violations have been found by the Supreme Court to be Constitutional violations under the Fourth Amendment.

Question 2. Because the 2nd Circuit denied Drake the right to a private right of action for violations of the DOT drug testing program mainly because of his administrative right of action under U.S.C. 46101(a) and the DC Circuit has now ruled that Drake has no right under 46101 for a remedy of the testing violations, is the DOT testing program a violation of Drake's, and all similarly situated non-union flight attendants, Constitutional rights because of the total lack of any due process.

Question 3. Does the FAA have "unbridled" right of discretion as to enforcement of the testing regulations.

Question 4. If the FAA does have this right as expressed in question 3 above, does this "unbridled" discretion place all actions, (tortious, Constitutional and procedural violations) beyond the pale of an APA claim. Even if the FAA has the discretion to investigate or not investigate, does that discretion extend to total protection from otherwise legitimate claims under the APA. Such claims as, hiding and lying about documented evidence of testing violations they found, intentional fraud, and covering up gross misconduct by the employer, the labs and the Medical Review Officer in regards to the DOT drug testing program.

Question 5. Does the FAA's right of discretion to investigate protect it from the findings in Motor Vehicle Mfrs. Ass'n. V. State Farm Mutual Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983)(agency must articulate a satisfactory explanation for its action)

Question 6. Must the people that are required to give up a Constitutional protection for the good of the public be assured

of due process rights to protect them from the greater exposure to harm the Constitutional protection was put in place to prevent.

Question 7. Did the court enlarge the meaning of Heckler v. Chaney, 470 U.S. 821, 830 (1985), and Citizens to Preserve Overton Park Inc. V. Volpe, 401 U.S. 402 (1971) and misapplied them to this case.

Question 8. When the Court of Appeals hears the case of a pro se litigant should the court be allowed to introduce, and then base its decision on, a novel legal issue not raised by the defense in its pleadings for which the pro se litigant would not be prepared to defend and then allow the court to deny a motion for a rehearing on that issue.

## LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

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Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 607 109 S. Ct. 1402(1989)
Webster v. Doe, 486 U.S. 592, 599-600 (1988)

## OPINIONS BELOW

**Drake v. FAA**, 291 F.3d 59 (D.C. Cir. 2002)

**Drake v. FAA**, CV 99-2790, 2000 U.S. Dist Lexis 22097 (D.D.C. July 31, 2000)

**Drake v. FAA**, No. 00-5328 (DC Cir. Mar. 16, 2001)

**Drake v. FAA**, CV 98-2758 ( D.D.C. July 31, 2000)

**Drake v. Delta Airlines, Inc.**, 147 F.3d 169 (2d Cir. 1998)

## JURISDICTION

This petition is timely filed.

The decision of the lower court, DC Court of Appeals, was issued on, March 16, 2001.

Petition for rehearing was denied on July 22, 2002. The 90 day period to petition for a writ of certiorari ends on Saturday October 19th 2002, making Monday, October 21, the last day to file.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fourth Amendment to the United States Constitution.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Fourteenth Amendment to the United States Constitution. Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Fifth Amendment to the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of Life, Liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

## STATEMENT OF THE CASE

In November of 1993, Drake, a Delta flight attendant with 35 years of spotless service, was selected for the fourth time in a six month period for random drug testing under the DOT drug testing program.

Statistically it would take sixteen years to be selected four times. No other Delta Flight attendant was selected, or has been selected, that often. These four selections occurred right after an employee management meeting in which Drake was a very vocal participant.

Before the Delta take-over of Pan Am, Drake had not only been one of the major organizers of the new Pan Am union of flight attendants, but he was the first New York chairman and the strike marshal for the new unions successful job action. Delta flight attendants are still non-union.

At her recent deposition, a Delta manager, Diane Tennihan, who was the head of Delta's drug testing program, admitted that she had been asked by other un-named management people to add certain employees names to the list of people selected at random for testing.

As a result of Drake's last test on November 28, 1993, Drake was informed that an un-named adulterant had been found in his sample and he was asked to resign. Drake asked to be shown these lab results. All information was denied and he was terminated.

Drake was denied unemployment and appealed for a hearing. The hearing in New York, before an administrative law judge, was attended by a Delta attorney and two Delta management witnesses. The judge found that "Drake had not altered his sample, did not use drugs and was not fired for cause." Drake received full unemployment but Delta refused to reinstate him.

Drake filed suit against Delta in District Court in New

York,(Drake v. Delta Airlines, Inc., 923 F. Supp, 387 (E.D.N.Y.1996). His motion for discovery was denied and his case was dismissed. Because he was pro se, he was given a chance to amend his complaint. He did amend and it was dismissed again. He appealed and the 2nd Circuit affirmed that employees do not have a right to private action for violations of the drug testing regulations based mainly on the fact that Congress had established a "comprehensive mechanism for relief" through 49 U.S.C. $ 46101(a). They remanded for hearing on Drake's Fourth Amendment rights. They also suggested that Drake be provided counsel, (Drake v. Delta Airlines Inc.,147 F.3d 169 (2d Cir. 1998). Sam Maduegbuna, a New York attorney took the case. Some limited issues are still ongoing in that case.

Because of the 1998 finding by the 2nd Circuit that Drake had a right to relief under a $ 46101(a), Drake filed a complaint with the FAA for that relief. Days after the initial meeting with the FAA drug enforcement people, Drake filed a suit in the DC District Court claiming lack of due process.(Drake v. FAA, No. 98-2758 D.D.C.)(FAA I) Despite Drake's complaints, Judge Lambreth took no action on Drake's case for over a year.

In 1998 the FAA launched an investigation of Drake's complaints of testing violations and issued a report (the Hecht letter) which claimed that Delta had not violated any DOT regulations in Drake's testing.

After exhausting all administrative remedy's, Drake filed suit against the FAA for not reporting evidence the FAA had found, for lying in their report about what they had found, for allowing Delta to violate the DOT testing rules, for entering into a conspiracy with Delta to cover-up serious testing misconduct, and for not providing Drake with the promised protection of $ 46101(a), (Drake v. FAA, Civ. Act No. 99-2790 D.D.C.)(FAA II)

On July 31, 2000, Judge Lambreth suddenly resurrected FAAI and dismissed both cases on the same day. Dismissing FAA I, the due process case for failure to state a claim upon which relief can be granted, finding that new regulations had superseded the ones in effect when Drake pleaded his case. Drake argued that the new ones did not address or change the due process rights for employees but the court failed to consider this fact.

The court also dismissed the FAA violation case, FAAII, on the bases of res Judicata even though Drake argued that the events in the second case had not even occurred at the time of filing the first case.

Drake appealed both cases at once. The DC Circuit affirmed the dismissal of FAA I, on March 16, 2000, which included Lambreth's finding that Drake had a right to relief under $ 46101(a).

On May 31, 2002, In FAA II, the same Circuit found that Drake's "claims were improperly dismissed on *res judicata* grounds.". In the same decision, the DC Circuit then dismissed Drake's claims on the very opposite understanding of $ 46101(a) that the same circuit had affirmed in FAA I. Namely that $ 46101(a) does not offer relief.

FAA II, unquestionably and at length stated that Drake has no right under $ 46101(a) and that the FAA has "unbridled" discretion to do as it wishes under that title. This dismissal included the above listed misconduct of the FAA which included fraud and intentional misrepresentation of discovered facts.

As a result, Drake filed this Petition because at the end of the day, Drake and all others similarly situated have no avenue for relief for their employers and the FAA's self serving abuse of the DOT Drug Testing Program. The court findings have allowed the employers and the FAA the unquestioned right to violate the DOT regulations at will. The employers

and the FAA know they can getaway with any violation or abuse and have not hesitated to do so.

Seven years after his testing and two years after the 1998 FAA investigation, the Freedom Of Information Act(FOIA) provided Drake with hard documented evidence that:

1. The confirmatory test on Drake's sample at a second lab using GC/MS testing (the highest level)was negative not positive for adulterants and drugs as claimed in court documents by both Delta and the FAA.

2. One of the two documents, the DOT Custody And Control Form, which had been sent to Drake in 1994, had been Xeroxed, altered with white-out to eliminate the negative finding, re-Xeroxed and provided to Drake claiming to represent the original. The FAA knew this and intentionally covered it up. The original, viewed by Drake for the first time in the Deposition of Dr. Whaley(April 29, 2001), still had the checkmark in the "negative " box.

3. There was no chain of custody used for Drake's sample as it was sent from lab to lab for testing. The DOT Inspector General confirmed this in his report to Congressman Wolf and the FAA still to this date has covered this up and refused to take action. Drake will spare this court the supportive argument that lack of a chain of custody is fatal to any testing result regardless of whether it is positive or negative.

"...we identified deficiencies in its[the FAA's] investigation, and found that Mr. Drake raised valid questions about the manner in which Delta handled his test...Notably, we concluded that Delta's Medical Review Officer (MRO) did not demonstrate for the FAA that he reviewed the chain of custody, as required under the regulations, or that certain required records ever existed to document the transfer of Mr. Drake's specimen from one specific laboratory to another."(DOT IG

report to Congressman Wolf, July 18, 2001)

4. The FAA blatantly lied in there written statements to the DC District Court about the facts of Drake's testing in order to support their lack of action on his complaint. This was before Drake was provided with the documents through the FOIA, which made it impossible for him to defend himself.

5. The FAA knew about and allowed at least 17 other major violations of the DOT testing they discovered during their investigation of Drake's case.

Every one of the numbered items above is well documented by papers obtained from the FAA itself under the FOIA. Even in light of the fact that Drake now has this hard evidence, Both the FAA and the DOT have refused to act because they know that Drake has no legal recourse.

To Date, all three, Delta Airlines, the FAA and the DOT have managed to avoid nine years of repeated attempts by Drake to take some sort of legal action to expose and remedy this outrageous conduct by those administering the DOT drug testing program.

**The Supreme Court must understand that the above facts are not presented in order to have this court rule on Drake's individual case, but only as an example of ripeness for the relief sought in this petition.**

If this court grants Drake and those similarly situated some right to due process, Richard Drake, N.B. Varlota, Yasuko Ishikawa, Julia Jones, Cheryl Dumas, Donna Baker, Richard Whitman, and Edith Smith to name a few, will address the testing violations during that due process and succeed or fall based on a fair hearing.

All of the above named non-union employees from various airlines have well documented proof of their innocence. All of them have had their lives ruined, been

unable to get other jobs they are well qualified for and had to endure the stigma and embarrassment before their family and friends of being branded a druggie.

Duke Siotkas, a Delta pilot, whose case like Drake's was not auctioned by the FAA, is back at work with full back pay and allowances because he was able to present his case to the NTSB. The outrageous conduct in his testing, which included the shredding and falsifying of lab reports, use of testing equipment that was not acceptable for the type of testing conducted, and rounding off of test results to the nearest whole number that resulted in his failing the test he actually passed, resulted in his being accused of submitting a substituted sample and being unemployed for 2 years.

The DOT and the FAA failed to act in his case. Only through his right to due process was he able to establish his innocence and clear his name. Flight attendants Varlota and Ishikawa with the exact same problem with the exact same lab had no rights and got no relief form the FAA.

This special group of non-union employees need, and justifiable should have some form of due process.

## REASONS FOR GRANTING THE PETITION

There are four main reasons for granting the instant petition.

1. Due process protections must be extended to citizens that are subjected to intentional Governmental Constitutional violations.

When the Government created the DOT Random Drug Testing Program, it knowingly had to violate the Constitutional right of those to be tested.(see Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 607 109 S. Ct. 1402(1989) at 1410:

"...that the breath , blood, and urine tests contemplated by the FRA(regulations)are Fourth Amendment searches." Random drug testing violates the 4th Amendment because there is no "probable cause" for the search.

Whenever the Government feels that something is so important to the social good that it must violate the Constitutional rights of a segment of the population in order to effect that very important social good, it must make every effort to protect that segment of the population from the added exposure to damage the violated Constitutional right may cause.

DeShaney v. Winnebago Co.,489 U.S. 189 (1989) supports this concept finding that, when the action of the state makes one more vulnerable to harm, procedural correctness is required.

Taking away a Constitutional protection from selected citizens is a serious event and certainly makes one more vulnerable to harm. If this were not true there would be no need for the Constitutional protection in the first place. To take away that Constitutional protection, then go to the effort of putting in place very strict and narrow regulations to protect

those people from abuse is an effort in the right direction. To then prevent those people from any form of due process to remedy the violations of those regulations is arguably civil injustice but certainly a violation of the intent of DeShaney.

Even worse are abuses committed in the name of a social good by those that are supposed to be administrating them fairly. These should be considered abuses of an even higher degree then usual because of the Constitutional deprivation involved. It is like demanding that someone wear a blind fold for the benefit of society then hitting him on the head with a club and denying him the same right to a remedy that is extended to every citizen that did not have to wear the blindfold. Our blind folded man should receive equal protection at least but certainly not less protection.

Due process protections must be extended to citizens that are subjected to intentional Governmental Constitutional violations such as Government mandated random drug testing.

2. Three Courts of Appeal have ruled on the issue of Drake's right to private action for violations of the DOT drug testing program. They are in opposition to each other.

The 2nd Circuit affirmed the dismissal of Drake's complaints that addressed Delta's violations of 49 CFR part 40 (the DOT drug testing regulations),

"...because there is no implied private right of action for employees under those regulations." Noting that:

"We note as did the district court, that Drake could have sought redress of the alleged regulatory violations through administrative avenues,...citing 49 U.S.C. $ 46101(a)." (Drake v. Delta, 147 F3.d 169 (2d Cir.1998)

Drake pursued this remedy with the FAA even though Drake had pleaded to the 2nd Circuit back in 1996, that 46101(a) does not offer relief to employees. 46101(a) is only a process for the FAA to compel the airlines not to do it again

and possibly fine the airlines. The New York District Court and the 2nd Circuit rejected Drake's position.

The D.C. Circuit went even further away from the 2nd Circuits position then Drake had in 1996, finding that:

"The language of $ 46101(a)(3), which set the terms for the FAA's decision to dismiss Drake's complaint without a hearing, is highly discretionary. Indeed, a provision that allows the Administrator to act when she "*is of the opinion* that the complaint does not state facts that warrant an investigation," gives the FAA virtually unbridled discretion over such decisions."Drake v. FAA, 291 F.3d 59 (DC Cir. 2002)

This opinion by the DC Circuit does two things. First, it flies in the face of the 2nd Circuits decision that 46101 gives Drake an administrative mechanism for relief. Second, it also reverses Justice Kennedy's Supreme Court finding that:

"Circumstances justifying toxicological testing and the permissible limits of such intrusions are narrowly and specifically defined by the regulations and doubtless are well known to covered employees, and since there are virtually no facts for a neutral magistrate to evaluate, in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program."Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 607 109 S. Ct. 1402(1989):

Judge Edwards Circuit Court Opinion changes Justice Kennedy's "minimal discretion" into "unbridled discretion" over the enforcement of the narrowly and specifically defined regulations.

Since the two Courts of appeal find a different understanding and use of U.S.C. $ 46101, and Judge Edwards seems to reverse Justice Kennedy, this Court should address the question of; Does U.S.C. $ 46101(a) give Employees a right to compel a fair and honest investigation of DOT drug

testing violations, or is it subject to FAA unbridled discretion thus leaving employees with no right to address Dot drug testing violations and obtain relief? This decision also, as it did in Drake's case, eliminated any right of the employee's to question the violations of the FAA in the drug testing program as well.

The DOT agency itself supports the DC Circuit's decision in FAA II and the fact that Drake's remedy lies in a private lawsuit. The courts say go to the FAA. The FAA says go to the court. The result is nowhere to go.

In the DOT IG report (signed by Kenneth Mead) to Congressman Wolf the DOT noted as follows:

"The regulatory authority of the FAA (as well as DOT's other operating administrations) is limited to effecting enforcement action (e.g., civil penalties) against employers who violate the drug testing regulations, and does not extend to providing personal relief for aggrieved employees."(Wolf report, page 4.)

And

"Mr. Drake's avenue for personal relief in this matter rests with his litigation against Delta, we are transmitting our report of investigation with accompanying recommendations to the Departmental Office of Drug & Alcohol Policy and Compliance, as well as to the FAA, for appropriate action." (Wolf report, page 4.)

This court is urged to accede to the DOT's interpretation that Drake has no remedy under its regulations or under $ 46101. The Supreme Court's seminal decision in Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945) established the basic principle that an agency's interpretation of one of its own regulations commands substantial judicial deference. That interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

The testing regulations themselves specifically contemplate lawsuits. The regulations contain many cites concerning an employee's right to bring a lawsuit for injury arising from a drug test.

"The MRO may reveal the quantification of test results to the employer, the employee, or the decisionmaker in a lawsuit, grievance or other proceeding initiated by or on behalf of the employee..."40.29(g)(3)

"The laboratory shall be required to maintain any specimens known to be under legal challenge for an indefinite period."40.29(h)

"The laboratory shall disclose information related to a positive drug test of an individual to the individual, the employer, or the decisionmaker in a lawsuit, grievance or other proceeding initiated by or on behalf of the individual..."40.35

"Another confidentiality issue concerns formal proceedings (e.g. lawsuits, grievances, arbitrations) in which an employee challenges action taken by an employer as the result of a drug test...It would be unfair if in an adversarial proceeding, one side had access to information which the other did not." 49 CFR part 40 page 49861(d)(1989)

The provisions of the regulations therefore leave little doubt that challenges to the drug testing under the regulations may be addressed in judicial and quasi-judicial forums, including filing lawsuits.

3. Drake is aware of the "balancing" test formulated in Mathews v. Eldridge, 425 US 319 (1976). In Drake's case, the action of being terminated for failing a DOT drug test in the

airline industry destroyed his 35 year spotless career. It also branded him a drug user. This destroyed any chance of employment in the airline industry as well as almost any chance of employment at all. This would be true of any person terminated under the DOT drug program and in fact is true of all the named employees listed above.

Pilots have the right to a hearing before the NTSB(National Transportation Safety Board) because they have a certificate. Many pilots have been returned to work after a hearing before the NTSB because it was discovered that gross errors and misconduct had been found in their testing. Flight attendants do not have a certificate and do not have the equal right to a hearing even though the errors and misconduct are the same. The bottom line is that a fair adversarial hearing can have great value in obtaining justice for innocent employees.

The Government of course has no interest in unjustly destroying the life of an innocent person. However that is what is happening. Any system of law enforcement that simply accuses a person, they are automatically found guilty, punished severely and have no right to complain is an unjust system.

Non-union flight attendants, of which there are thousands, should have the same rights under the government drug program as pilots and union employees. Pilots have the NTSB and union employees can file grievances.

4. Heckler v. Chaney may apply to the FAA decisions to abort its investigation and not pursue Delta, but it does not apply to its decision not to enforce its own regulations or publish lies that harm Drake. Especially when the regulations involved (Lies, Chain of Custody and fraud violations) have long established legal norms in our society.

Both Heckler v. Chaney, and Overton Park, only apply to situations where there is "No substantive legal criteria against

which an agency's conduct can be seriously evaluated." These cases only apply when "the courts have no legal norms pursuant to which to evaluate the challenged action, and thus no concrete limitations to impose on the agency's exercise of discretion."

When the agency 'lies" in its reports and clear documented evidence support that they did lie, the question of "legal criteria" has been met and neither Chaney or Overton Park applies. When the FAA says that the chain of custody was proper and complete and documented evidence prove it was not, Chaney and Overton Park can not be used to dismiss the APA claim.

Any court can rely on long established law about the proper use or condition of a chain of custody. When the FAA permits, and enters into a conspiracy to hide, the fact that a copy of a federal document was Xeroxed, "Negative" was changed with white-out and then re-Xeroxed and sent to Drake fraudulently representing it as a copy of the original, Chaney and Overton Park can not be used to block the APA claim that the FAA failed to enforce their own rules. This is a vile abuse of the intent of Chaney and Overton Park. There is "law" that can be applied here.

This Court cannot say that it was ever the intent of any cited court ruling to allow this level of agency misconduct. It was never the intent to allow an agency to hide its abuse of power behind an interpretation of the law involving discretionary acts. Where the court cites Chaney, to allow the FAA to rely on its discretionary right, it only applies to its discretion not to have a hearing and not to pursue Delta. It does not protect it from all APA claims for misconduct and not enforcing the DOT Drug Testing Rules. Especially when the violations in question are not obscure but grounded on solid established legal criteria.

The court should be made aware that the statuary requirement

to "enforce" the drug testing rules is not part of 46101 which deals with "investigation and punishment". 46101 is only a part of the FAA's responsibilities of enforcement. Congresses main direction for enforcement comes from Section 3 of the Testing Act which compels the FAA to "enforce" the testing rules.

The court did notice that there was a separation between the FAA's findings and the resultant actions it took. However the court then tries to tie them together again on the grounds that *the result of one is the only use for the other*. This is totally untrue for two reasons.

First, that the FAA's "factual findings were inextricably intertwined with its decision not to issue a compliance order". This falls short of the complete situation and completely disregards the issue of Drake's innocence as a result of that same investigation and the FAA's misconduct. Drake's innocence is a much larger and more important issue then fining Delta. It also completely disregards the FAA's motive to hide its own failures and misconduct in the testing process. The testing program at Delta that the FAA is responsible for is loaded with errors and illegal activity that the FAA is allowing and the DOT IG pointed out. By shelving **EVERY** complaint and investigation it is abusing its discretionary power to bury investigation after investigation by simply saying "no violation occurred". Did the Appeals Court read the DOT's own report to Congressman Wolf. The report said " no chain of custody ever existed". The FAA said no violations!!! What was the court thinking. The FAA's factual findings are intertwined with many motives and many results. It is unfair to consider only one use of the factual findings and use it to dismiss the others. It is unfair to point to only one reason for the investigation, the pursuit of possible action against Delta, when it is clear that there are many reasons for the investigation including the most important one,

"maintaining the integrity of the testing program and its rules". The Courts opinion that

> "the FAA's decision, that the facts did not show a violation of Part 40 was inseparable from its decision to take no further prosecutorial action against the carrier."(Apl. Ct. Opinion, pg 17.)

is simply untrue. The FAA's decision that the facts did not show a violation are part and parcel of many other issues affecting many other things. Especially when the DOT says there were violations. The overarching result of the investigation is the guilt or innocence of Drake. There are many reasons and effects of the FAA's intentional misrepresentations in its investigation.

Second, as mentioned above, there is "law to apply" as in the sense indicated by the Supreme Court in Overton Park. The statute at issue does not give the FAA "virtually unfettered discretion to do as it did". No case has ever supported lying about evidence, fraudulent alteration of evidence and destruction of evidence.

The result of what the FAA did was a finding that Drake was guilty of failing a drug test in which all the rules in Part 40 were followed. Which is untrue. This finding has nothing to do with 46101 and this is the real "intertwined" reason for the investigation and clearly a reason to allow Drake to proceed on his APA claims.

In any case, It was really unfair for the court to spring Chaney on Drake when the FAA had not properly raised it in their pleadings. He wasn't prepared and until now did not fully understand Chaney. A rehearing on the application of Chaney and Overton Park to Drake's case should be granted.

As the court correctly noted, the FAA has the power to cancel Drake's test if it finds violations of Part 40. Such a finding would effectively clear Drake of having failed a properly administrated drug test. 46101 does not address any

discretion on the part of the FAA concerning enforcement or investigation or the production of improper findings on the issue of canceling Drake's test for violations or the guilt or innocence of Drake.

Webster v. Doe, 486 U.S. 592, 599-600 (1988) excludes any blockage of an APA claim because the claimed improper actions of the FAA infringes on Drake's Fourth Amendment protections.

In any case, Webster, 486 US at 603-4 excludes any blockage of an APA claim because, as Supreme Court Justice Kennedy held in Skinner v. Railway Exec. 109 S.Ct 1402, 1989 , "The Fourth Amendment was applicable to drug...testing" And "urinalysis at the direction of the Government and must be considered a search under the Fourth Amendment." Therefore, denial of the protections as outlined in Part 40, would be Fourth Amendment infringements the same as any other "governmental search", and not subject to agency discretion under Webster. The testing rules implicate the Fourth Amendment and are not subject to denial under Chaney.

The court also failed to consider the fact that by allowing the FAA to say that they found no violations of Part 40,(violations that are Fourth Amendment violations) they have allowed the FAA to say that Drake is guilty of drug abuse.

For the above reasons the Opinion of the Appeals Court should be reversed and Drake's case against the FAA remanded for trial.

5. Question (8) above stands apart from the entire issue of drug testing. It applies to any pro se litigant(or an Amicus law student) that comes to oral argument before a court of appeals. There appears to be no case on point. The main support for my position is the last part of Section one of the Fourteenth Amendment and old fashion basic fairness.

Drake does not argue that the court should not have the

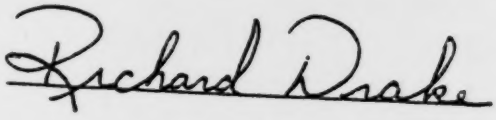
right to present new or novel case law at hearings. The court must however not blind side a pro se litigant that is not familiar with every major precedent case as an attorney may be. It is hard enough for a lay person to try and present a case to the court of appeals without being blind-sided by a completely new defense that one may not be prepare for. Especially when it becomes the controling issue upon which the courts decision is based. This process denies the pro se litigant "equal protection of the law" as expressed in the 14th Amendment and is unquestionably unfair.

This court should require that in cases where a pro se litigant is presented with issues and supportive case law that were not raised by the opposition in its pleadings, the court must provide the pro se litigant time to respond either in writing or rehearing.

## CONCLUSION

For the reasons listed above, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 21 October 2002

No._____

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IN THE

SUPREME COURT OF THE UNITED STATES

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RICHARD DRAKE -- PETITIONER

VS.

FAA --RESPONDENT

---

**PROOF OF SERVICE**

I, Richard Drake, do swear that on this date, October 21, 2002, per rule 29, I have served the enclosed PETITION FOR A WRIT OF CERTIORARI on each party required by first class mail, postage paid or by hand delivery to the address listed below. Corrected copies of Appendix served on 12/17/02.

Christy Slamowitz
United States Attorney
555 4th St. NW
Room 10818
Washington, DC
20001

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

**21 October 2002,** R Drake

**Richard Drake- Prose**

No.

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In The

# Supreme Court of the United States

---

Richard Drake

Petitioner

v.

Federal Aviation Administration

Respondent

---

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia

---

## APPENDIX

Richard W. Drake
10495 Butterfield St., Apt 31
Manassas, VA, 10495
703-369-1211
Pro se

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APPENDIX A.1.

**THE SUPREME COURT READERS OF JUDGE LAMBRETH'S DISTRICT COURT DECISION MUST BE AWARE THAT ALL OF THE FACTS PRESENTED IN HIS OPINION WERE DISPUTED BY DRAKE IN HIS APPEAL AND IN HIS ORIGINAL COMPLAINT. THE COURT OF APPEALS HOWEVER IGNORED THIS ISSUE IN IT DECISION AND CHOSE TO ACCEPT THE UNTRUE UNSUPPORTED STATEMENTS OF THE FAA AS OPPOSED TO DRAKE'S DOCUMENTED FACTS.**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| **RICHARD DRAKE,** | ) | |
| **Plaintiff,** | ) | **Civil Action No. 99-2790 (RCL)** |
| **v.** | ) | |
| **FEDERAL AVIATION ADMINISTRATION,** | ) | **FILED,** July 31, 2000 |
| **Defendant.** | ) | |

**MEMORANDUM OPINION**

This matter comes before the court upon a complaint filed by plaintiff Richard Drake against the Federal Aviation Administration ("FAA") seeking 1) a court order compelling the FAA to conduct a "proper, fair investigation" of plaintiff's complaint against Delta Airlines ("Delta"),2) a court order requiring the production of reports and other pertinent information from the FAA's investigation of Delta, and 3) a right of private action against the FAA. See Plaintiff's Complaint (filed October 21, 1999). For the following reasons, the FAA's motion to dismiss will be granted.

**I. Facts**

On November 21, 1988, the FAA issued regulations requiring airline employees who perform "safety sensitive" tasks to submit to random drug tests. The Department of Transportation ("DOT") expanded the drug testing regulations in 1989 to include flight attendants within the category of employees required to undergo testing. Soon thereafter. Delta established a drug testing program in accordance with the FAA mandate and randomly selected Richard Drake, a flight attendant, to be tested on October 23, 1993. Under the testing procedures, plaintiff submitted a urine sample to the designated collector, who forwarded the sample to CompuChem Laboratories. On November 4, 1993, CompuChem informed Delta that plaintiff's urine sample was unsuitable for testing due to the presence of glutaraldehyde, and artificial chemical used to mask the presence of amphetamines. To Confirm that Drake's sample had been adulterated with glutaraldehyde, Delta arranged for Drake's sample to be tested by a second laboratory, NorthWest Toxicology. After NorthWest Toxicology confirmed the presence of glutaraldehyde, plaintiff was terminated on December 29, 1993. Subsequently, plaintiff was granted a formal hearing to assert his innocence, but in February 1994 Delta reaffirmed its decision to terminate plaintiff's

employment. See Drake v. Delta Airlines, Inc., 923 F.Supp. 387, 389 (E.D.N.Y., 1996), aff'd in part and vacated in part., 147 F.3d 169 (2d. Cir. 1998).[1]

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1. Plaintiff brought suit against Delta Airlines in the United States District Court for the Eastern District of New York after he was fired from his job following the same drug test that is at issue in this case. Drake claimed that the airline violated his Fourth Amendment rights as well as his rights under the Department of Transportation (DOT) drug testing regulations. The court dismissed Drake's suit against Delta Airlines after finding that 1) no private right of action existed for violations of the FAA's drug regulations, and 2) the procedures followed by the airline to examine plaintiff's urine sample did not violate Drake's Fourth Amendment rights. Plaintiff appealed, and the Court of Appeals vacated the judgment only insofar as it dismissed Drake's Fourth Amendment rights. Plaintiff appealed, and the Court of Appeals vacated the judgment only insofar as it dismissed Drake's Fourth Amendment claims, ruling that the District Court's 12(b)6 dismissal of these claims was improper.

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On August 20, 1994, plaintiff requested from Delta all records pertaining to his drug test pursuant to 49 C.F.R. 40.37. Both parties stipulate that Delta initially provided plaintiff with only a portion of the relevant information. During a routine investigation in January 2000, the FAA identified the specific

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documents that were not originally disclosed and ordered the airline to release them to plaintiff.

Meanwhile, Drake had contacted management personnel in the FAA's Drug Abatement Branch with numerous allegations of Drug Testing Act violations in connection with the acquisition and examination of his urine sample. On October 12, 1998, Drake submitted a written request for the FAA to conduct an inquiry on his behalf. The agency responded by rescheduling a routine annual inspection of Delta and conducting a week-long investigation of the airline, during which a seven-member FAA inspection team failed to uncover any evidence of wrongdoing.

Four days later, plaintiff brought suit against the FAA in United States District Court for the District of Columbia seeking procedural due process rights for all employees alleging violations of the federal testing regulations. See Drake v. Federal Aviation Administration, Civil Action No. 98-2758 (hereinafter Drake 1). Citing the pending lawsuit, the FAA rejected a subsequent written request from plaintiff for all information pertaining to the FAA investigation. The plaintiff then filed this action on October 21, 1999 (hereafter Drake 2) alleging that the FAA's refusal to release this information, coupled with the agency's failure to corroborate his allegations

against Delta indicated that the two organizations were engaged in a conspiracy to cover up irregularities in Delta's drug testing procedures.

**II. Analysis**

**A. Plaintiff's Claim is Barred by Res Judicata**

Res judicata prohibits the plaintiff from litigating this case in light of this court's 12(b)6 dismissal in Drake 1 of plaintiff's first action against the FAA. See Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182 (W.D.N.Y. 1996) ("[A] dismissal under Rule 12(b)(6) is a dismissal on the merits of the action - a determination that the facts alleged in the complaint fail to state a claim upon which relief can be granted.") The essence of res judicata is that it "precludes relitigation in a subsequent proceeding of all issues *arising out of the same cause of action* between the same parties..whether or not the issues were raised in the first trial." Faulkner v. Government Employees Insurance Company (GEICO) 618 A.2d 181, 182 (D.C. Cir. 1992)(emphasis added)

In Drake 1, alleged irregularities surrounding Drake's drug test prompted plaintiff to sue the FAA to obtain additional procedural rights for airline employees subjected to drug testing. When Drake brought this initial suit against the FAA, he was legally obliged to assert *all* of his claims against the

agency and to seek *all* forms of relief to which he was entitled given the alleged violations of federal regulations that occurred during his drug test and subsequent termination. Ee Stutsman v. Kaiser Foundation, 546 A.2d 367, 370 (D.C. Cir. 1988) (It is the factual nucleus, not the theory upon which a plaintiff relies, which operates to constitute the cause of action for claim preclusion purposes.") Instead, plaintiff deliberately divided his claims for relief between the two lawsuits he brought against the agency: "The first case filed against the FAA was only to obtain some form of due process rights for all Delta flight attendants. The first case in no way addresses the violations of his personal case..." See Plaintiff's Brief Statement of Case II (filed Feb. 1, 2000) Under the broad definition of "cause of action" set forth in Stutsman, a party cannot create an additional cause of action simply by alleging new theories of recovery or by requesting remedies that were not sought in the original lawsuit. Since this court finds that the same "factual nucleus" forms the foundation of both cases, the doctrine of claim preclusion requires this court to dismiss Drake 2.

In concluding that plaintiff's second lawsuit is barred by claim preclusion, this court acknowledges the substantial body of case law supporting the principle that pro se litigants

are entitled to more latitude during the pleading phase than parties represented by counsel. See e.g., Davidson v. Flynn, 32 F.3d 27, 31 (2d Cir. 1994) (pro se litigants should be given additional opportunities to amend insufficient pleadings); Foxa v. Strickland, 837 F.2d 507 (D.C. Cir. 1988) (district courts must take additional steps to advise pro se litigants of the consequences of failing to respond to a dispositive motion). Yet courts have refused to extend these procedural protections to the realm of res judicata: "Despite the federal courts' generally flexible approach to pro se pleadings, the pro se litigant must be bound by the same rules of law, including preclusion law, as those represented by counsel." Carlin v Gold Hawk Joint Venture, 778 F. Supp. 686, 693 (S.D.N.Y. 1991). Indeed, the important policies served by res judicata outweigh the potential unfairness to pro se litigants and justify this court's refusal to bend the rules of claim preclusion for plaintiff in this case: "Spurred by considerations of judicial economy and a policy of certainty and finality in our legal system, the doctrines of res judicata and collateral estoppel have been established to avoid repetitive litigation so that at some point litigation over a particular controversy must come to an end." Eastern Marine Construction Corp. v. First Southern Leasing, Ltd. 525 A.2d 709, 711 (N.H. 1987).

**. Plaintiff Cannot Seek Relief Based on the Merits**

While res judicata is dispositive of the outcome in this ase, this court feels compelled to comment on the merits of rake's complaint in light of his repeated attempts to seek ompensation from Delta Airlines and the FAA. In brief, overeign immunity would preclude this court from granting laintiff legal or equitable relief even if the merits of his case ould be adjudicated. Furthermore, this court finds that rake's failure to exhaust his administrative remedies for taining the FAA investigation reports prohibits this court om compelling their production.

**Sovereign immunity precludes this court from granting plaintiff monetary or equitable relief**

Even though Drake's complaint seeks to cast doubt on integrity of the FAA investigation into Delta's drug testing ocedures, sovereign immunity precludes this court from anting plaintiff the relief he requests since the FAA's cision not to seek sanctions against the airline was an act of ency discretion. See Memorandum of Points and Authorities Support of Defendant's Motion to Dismiss, p.3 (filed nuary 21, 2000). Generally, private causes of action against government are barred by sovereign immunity unless ngress through a statute explicitly waives the government's



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right not to be sued. See United States v. Kubrick, 444 U.S. 111 (1979). In Drake v. Delta Airlines, 923 F.Supp. 387 (E.D.N.Y. 1996) aff'd in part and vacated in part, 147 F.3d 169 (2d. Cir. 1998) the district court ruled that Congress did not incorporate any such waiver into the Testing Act: "It is clear that Congress in enacting the Testing Act intended to provide a general benefit to the public by increasing the level of passenger safety, and did not intend to establish a private right of action for the transportation industry's employees." Id. at 392.

The discretionary nature of the FAA investigation also eliminates the Federal Tort Claims Act as a potential vehicle for relief in this case. According to 28 U.S.C.A. 2680(a): "The provisions of [the Tort Claims Act] shall not apply to any claim based upon an act or omission of an employee of the Government...or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency whether or not the discretion involved be abused." The purpose of this exception is "to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." See Varig Airlines, 467 U.S. 797, 798 (1984).

Federal courts have frequently invoked 26 U.S.C.A. 2680(a) to protect the FAA from civil claims. In Varig Airlines, he plaintiff brought suit against the FAA claiming that the overnment was liable for negligently inspecting a lavatory rash receptacle during a routine aircraft inspection, resulting n the destruction of the airplane from a fire spreading through he lavatory. The Supreme Court upheld the dismissal of laintiff's complaint, reasoning that since the extent of a given spection is entirely within the discretion of the FAA mployee on-site, the government cannot be held liable under ction 2680(a). See id. at 820-821. This exception to the ederal Tort Claims Act also led the United States District ourt for the Northern District of Illinois to dismiss the mplaint of a plaintiff claiming that the FAA disregarded a tutory provision entitling her to preference in hiring for an ency position. See Anagnost v. FAA, 1997 WL 792978 .D.Ill. Dec. 22, 1997). These cases indicate that even if the A grossly abused its discretion in failing to take legal or ministrative action against Delta, this court has no authority award monetary damages, impose sanctions, or provide intiff with equitable relief by ordering the FAA to conduct ew investigation. As the United District Court for the rthern District of Indiana observed in Koppie v. Busey, 832

F.Supp. 1245 (N.D.Ind. 1992): "Even if the FAA acted in a negligent manner, or even if their behavior constituted a gross abuse of discretion, sovereign immunity is not waived if the agency is performing a discretionary function." Id at 1252.

**2. This Court cannot compel the FAA to furnish plaintiff with the November 1998 investigation reports**

The one element of Drake's complaint that is not precluded by the doctrine of sovereign immunity is plaintiff's claim that he was entitled to receive a copy of the investigation report and any "supportive findings" of the investigation pursuant to 49 C.F.R. 40.37, which states: "Any employee who is the subject of a drug test conducted under this part shall, upon written request, have access to any records relating to his or her drug test and any records relating to the results of any relevant certification, review, or revocation-of-certification proceedings." The FAA asserts, however, that the results of their investigation are protected from public disclosure by Freedom Of Information Act ("FOIA") exemption 7(a) to 5 U.S.C. 522b part(c), which permits the FAA to withhold information if they "properly determine that releasing [this] information is likely to disclose investigatory records compiled for law enforcement purposes...but only to the extent

that the production of such records or information would interfere with enforcement proceedings."

This court finds that the release of FAA documents pertinent to this case is governed by FOIA regulations, and not encompassed by the language in 49 C.F.R. 40.37. Section 40.37 is entitled: "Individual access to test and laboratory certification results," and therefore not germane to the body of information produced during the agency investigation. Indeed, the inspection reports and "supportive findings" sought by plaintiff clearly cannot not be characterized as Drake's "test results," and the circumstances surrounding plaintiff's request for the investigation indicate that the FAA inspection was not conducted for the purposes of laboratory certification. Thus, while the language of the regulation may appear sufficiently broad to compel the production of this information, the title of the regulation significantly restricts its scope.

This court cannot grant Drake relief since the FOIA regulations require plaintiff to exhaust all administrative remedies prior to judicial review. See Stebbins v. Nationwide Mutual Insurance Co., 757 F.2D 364, 366 (D.C.Cir. 1985) (per curiam) ("Exhaustion of [administrative] remedies is required under the Freedom of Information Act before a party can seek judicial review."); Center to Prevent Handgun Violence v.

United States Department of the Treasury, 981 F.Supp. 20, 23 (D.D.C. 1997) ("Strict enforcement of the exhaustion doctrine is favored in FOIA cases."). After the FAA initially refused to release the investigation report, Drake had thirty days in which to appeal the decision to the FAA's Assistant Administrator for Region and Center Operations. See DEX 13, August 27, 1999 letter to Drake. In light of the cases cited above, plaintiff's failure to file an appeal pursuant to the instructions in the August 27 letter precludes him from receiving relief from this court.

**Conclusion**

This court finds that res judicata precludes the litigation of plaintiff's complaint. Furthermore, this court observes in the alternative that plaintiff has no grounds for relief on the merits of his case. Not only does sovereign immunity prevent this court from granting plaintiff monetary or equitable relief, but this court is prohibited from ordering the production of the investigation reports given plaintiff's failure to exhaust his administrative remedies.

A separate order shall issue this date dismissing the complaint.

DATE: 7-31-00

Royce C. Lamberth
United States District Court Judge

# APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued May 3, 2002 Decided May 31, 2002

No. 00-5329

RICHARD DRAKE,
APPELLANT

v.

FEDERAL AVIATION ADMINISTRATION,
APPELLEE

---

Appeal from the United States District Court
for the District of Columbia
(No. 99cv02790)

---

*Andrew Dunlap*, Student Counsel, argued the cause as *amicus curiae* in support of appellant. With him on the briefs were *Steven H. Goldblatt*, Director of the Appellate Litigation Program, Georgetown University Law Center, appointed by the court as *amicus curiae*, *Wendy M. Marantz*, Supervising Attorney, and *Kristina Marlow*, Student Counsel.

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

*Richard Drake* appearing *pro se*, was on the briefs for appellant.

*Madelyn E. Johnson*, Assistant U.S. Attorney, argued the cause for appellee. With her on the brief were *Roscoe C. Howard, Jr.*, U.S. Attorney, and *R. Craig Lawrence*, Assistant U.S. Attorney. *Christy A. Slamowitz*, Assistant U.S. Attorney, entered an appearance.

Before: EDWARDS, HENDERSON, and GARLAND, *Circuit Judges*.

Opinion for the Court filed by Circuit Judge EDWARDS.

EDWARDS, *Circuit Judge*: This appeal arises from the District Court's dismissal of appellant Richard Drake's action against the Federal Aviation Agency ("FAA"). Drake believes that Delta Airlines infringed his legal rights when it processed a random drug test that Drake was required to take by virtue of his flight attendant position. Drake therefore contends that the FAA neglected its statutory responsibilities in finding that Delta did not violate agency regulations and breached a regulatory obligation in refusing to disclose information bearing on that determination. The District Court dismissed all of Drake's claims, concluding that they were barred by *res judicata*. This was error. Nevertheless, we affirm the dismissal on other grounds. The efforts of amicus curiae to convince us otherwise were ultimately unpersuasive.*

Drake's requests for information are moot, because he has received all the documents to which he is entitled under the Freedom of Information Act ("FOIA"). While Drake argues that a since-amended FAA regulation, 49 C.F.R. § 40.37 (1993), guaranteed him more, we defer to the agency's reasonable interpretation of that provision, under which it ap-

* On August 15, 2001, the court appointed Georgetown University Law Center's Appellate Litigation Program as amicus curiae on Drake's behalf. A third-year law student, Andrew Dunlap, presented argument in support of the appellant. The court commends Mr. Dunlap on the excellence of his oral advocacy, which greatly assisted our deliberations and judgment in this case.

plies neither to requests made upon the agency itself nor to the broad class of information that Drake has sought here.

Next, we conclude that Drake cannot state a claim under the Administrative Procedure Act ("APA") against the FAA based on its failure to find that Delta had violated the agency's drug testing rules. Under the FAA's organic statute, the agency "*may* dismiss a complaint without a hearing when the Secretary [of Transportation] or Administrator is *of the opinion* that the complaint does not state facts that warrant an investigation or action." 49 U.S.C. § 46101(a)(3) (1994) (emphasis added). The FAA's decision to do just that here is "committed to agency discretion by law," and may not be reviewed under the APA. 5 U.S.C. § 701(a)(2).

The last two suggested bases for Drake's action are plainly meritless. First, Drake's complaint cannot be read to support an action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). A *Bivens* action cannot be maintained against a federal agency such as the FAA, and Drake has neither named nor served any individual defendants. Finally, Drake has asserted no basis for a claim under the Federal Tort Claims Act ("FTCA"). Just as the APA precludes review of the FAA's discretionary decision not to hold a hearing on Drake's complaint against Delta, that decision cannot give rise to FTCA liability either.

## I. Background

FAA regulations require that air carriers administer periodic drug tests on employees who perform certain safety-sensitive functions. *See* 49 C.F.R. pt. 40 (1993) ("Part 40"). In 1989, the Department of Transportation promulgated the Part 40 rules that were in effect during the times relevant to this case. *See* Procedures for Transportation Workplace Drug Testing Programs, 54 Fed. Reg. 49,854 (Dec. 1, 1989). These rules included a number of detailed requirements relating to the scope of drug tests and the procedural protections afforded to employees subject to testing.

Under the applicable version of Part 40, an employee's positive test results had to be verified by the employer's Medical Review Officer ("MRO"). Before doing so, however, the MRO normally was required to give an employee a chance to discuss his test result before reporting it to the employer. *See* 49 C.F.R. § 40.33(c)(1), (5). Where there were questions about the accuracy or validity of a positive result, the MRO could order a retesting of the original specimen. If this reanalysis was negative, the MRO was required to cancel the test. 49 C.F.R. § 40.33(e). If the result was "scientifically insufficient for further action," the MRO could either declare the test negative or order a retest under § 40.33(e). 49 C.F.R. § 40.33(g). Moreover, in a provision entitled "Individual access to test and laboratory certification results," the FAA regulations indicated that an individual "shall, upon written request, have access to any records relating to his drug test and any records relating to the results of any relevant certification, review, or revocation-of-certification proceedings." 49 C.F.R. § 40.37.

While Part 40 by its terms conferred no private right of action against a carrier, employees may file a written complaint with the FAA if they believe a carrier has violated the agency's rules or regulations. *See* 49 U.S.C. § 46101(a). In turn, the Administrator "shall investigate the complaint if reasonable ground appears to the ... Administrator for the investigation." *Id.* § 46101(a)(1). However, the Administrator "may dismiss a complaint without a hearing when the ... Administrator is of the opinion that the complaint does not state facts that warrant an investigation or action." *Id.* § 46101(a)(3). If there is a hearing, the Administrator "shall issue an order to compel compliance" with the regulations "if the Administrator finds in an investigation" that the regulations have been violated. *Id.* § 46101(a)(4).

In accordance with Part 40, Delta Airlines required its flight attendants to undergo random drug tests as a condition of their employment. In 1993, Drake was selected for testing four times, the last on October 28. His urine sample was sent to Delta's designated laboratory, CompuChem Laboratories, Inc., which prŏnounced it "unsuitable for testing," indicating

that it was somehow adulterated or abnormal. A subsequent report suggested that this initial result was "indicative of adulteration with glutaraldehyde," a substance often used to mask the presence of drugs in the body. This finding was transmitted to Dr. William Whaley, Delta's MRO, who decided to forward an aliquot of Drake's sample to another lab, North West Toxicology Laboratory, for further testing. Dr. Whaley allegedly did so without informing Drake or obtaining his consent.

North West's test came back negative for glutaraldehyde, although it revealed a pH of below 4, which the lab considered "inconsistent with human kidney function and highly suggestive of adulteration." Dr. Whaley thus decided to send the urine for yet another retest, this one to be conducted by Dr. Malmoud ElSohly, who believed that he could adjust for the abnormal pH and determine if the sample had been tainted. However, Dr. ElSohly's test uncovered no positive indication of either drugs or adulterants. Thus, while his report did indicate that "the specimen might be adulterated," Dr. ElSohly recommended that Dr. Whaley take no action against Drake "because of presumed adulteration." On November 24, 1993, Dr. Whaley contacted Delta directly, reporting the inconclusive results to the airline's drug program managers. He recounted Drake's testing history, noting that the Part 40 regulations forbade any additional testing on the October 28 sample. Dr. Whaley therefore suggested that Drake be contacted, at which point a new specimen could be collected.

On November 29, North West performed a third retest on Drake's original sample. This test came back positive for glutaraldehyde. The next day, after Delta learned of this result, Drake was removed from active flight status. One month later, he was asked to resign, and was fired when he refused.

On December 28, 1994, Drake filed a *pro se* complaint against Delta in the United States District Court for the Eastern District of New York, arguing that the airline's testing procedures had violated both the Part 40 regulations

and the Fourth Amendment. The District Court in New York dismissed the case on the ground that Part 40 provides no private right of action against a carrier and that the intrusion into Drake's privacy from the various retests of his urine was minimal. *See Drake v. Delta Airlines, Inc.*, 923 F. Supp. 387 (E.D.N.Y. 1996). On appeal, the Second Circuit affirmed as to the regulations, but reversed on the constitutional issue. *See Drake v. Delta Airlines, Inc.*, 147 F.3d 169 (2d Cir. 1998). That aspect of the case is still pending. In rejecting Drake's bid to sue under Part 40, the court of appeals noted that Drake "could have sought redress of the alleged regulatory violations through administrative avenues, such as by filing a complaint with the Secretary of Transportation." *Id.* at 171 n.2.

In September 1998, Drake formally requested that the FAA investigate Delta for its allegedly unlawful actions in processing his urine sample. Drake met with several agency employees, who purportedly told him that he would be given access to copies of all evidence and material collected during the FAA's investigation. Compl. in Civ. Act. No. 99-2790, at ¶ 11. The FAA conducted a week-long investigation of Delta between November 2 and November 6, 1998.

This inquiry was not yet completed when, on November 12, 1998, Drake filed a second *pro se* lawsuit, this one against the FAA itself in the United States District Court for the District of Columbia. *See Drake v. FAA*, Civ. Act. No. 98-2758 (D.D.C.) ("*FAA I*"). In this action, Drake alleged that the Part 40 regulations themselves violated the Fourth Amendment as well as "procedural due process." He contended that Part 40 failed to provide adequate hearing opportunities for tested employees and should have included a private right to sue carriers who run afoul of the rules' requirements. Compl. in Civ. Act. No. 98-2758, at ¶ ¶ 6, 9-10. This case was assigned to Judge Lamberth.

On March 25, 1999, while this matter was proceeding, the FAA informed Drake of the results of the agency's investigation. The FAA reported that it had found no evidence to support Drake's allegations against Delta. The agency also

informed Drake that any documents uncovered by the agency during the course of its investigation could be released to him only through FOIA. Thus, "as a courtesy," the FAA interpreted Drake's previous request for documents as a FOIA request, and submitted it to the appropriate office on his behalf.

Invoking § 40.37, Drake wrote to the FAA to argue that he had a right to information gathered during the agency's investigation. The FAA, however, continued to demur, insisting that only FOIA, and not the regulation, applied to Drake's request. In April 1999, Drake was informed that although the FAA had at least one responsive document, that document was exempt from disclosure under FOIA Exemption 7(a). This exemption applies to records complied for law enforcement to the extent that production "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 52(b)(7)(A). The agency noted, however, that the protection of Exemption 7 would terminate when its investigation of Delta was complete.

The instant case commenced on October 20, 1999, when Drake filed a second *pro se* action against the FAA in the United States District Court for the District of Columbia. *See Drake v. FAA*, Civ. Act. No. 99-2790 (D.D.C.) ("*FAA II*"). In this complaint, Drake alleged that the FAA's determination that Delta had not violated Part 40 was unreasonable, and the product of a conspiracy between the agency and the airline. Compl. in Civ. Act. No. 99-2790, at ¶¶ 20-31. He asked that the court compel the FAA to complete a proper, fair investigation of Delta and also to "release all information of that investigation to date and in the future." *Id.* at ¶ 44. This case was originally assigned to Judge Kessler, who transferred it to Judge Lamberth on February 2, 2000 as a related case to *FAA I*. Judge Lamberth had previously dismissed FAA I for lack of jurisdiction; he reopened the case following the transfer of *FAA II* in response to Drake's motion to reconsider. On July 31, 2000, however, Judge Lamberth granted the FAA's motion to dismiss both cases.

As to *FAA I*, the District Court found that the Part 40 regulations attacked by Drake did not violate procedural due process. Moreover, noting that those regulations had been superseded by new ones, the court declined to pass judgment on the constitutionality of the replacement regulations, which Drake had not challenged. *See FAA I*, Civ. Act. No. 98-2758, at 5-9 (D.D.C. July 31, 2000). Finally, the District Court concluded that no private right of action existed under Part 40. *Id.* at 9.

The District Court then dismissed Drake's action in *FAA II*, holding that the action was barred by *res judicata*, because it grew out of the same factual nucleus as did *FAA I*. *See FAA II*, No. 99-2790, at 3-5 (D.D.C. July 21, 2000). However, the District Court elected to "comment" on the merits, finding that Drake had failed to state a valid legal claim. *Id.* at 5.

The District Court suggested that the federal government's sovereign immunity precluded Drake from obtaining the relief that he sought from the FAA. As to Drake's information request, the court agreed with the FAA that FOIA governed, and that Drake was not entitled to judicial review of the FAA's decision to invoke Exemption 7(a), because he had failed to exhaust his administrative remedies. In support of this conclusion, the District Court read § 40.37 to apply *only* to the material referenced in its title: "test and laboratory certification results." The regulation did not, in the court's view, apply to the "body of information produced during the agency investigation." *Id.* at 8-9.

Drake appealed both decisions. On March 16, 2001, this court summarily affirmed the dismissal of *FAA I*. *See Drake v. FAA*, No. 00-5328 (D.C. Cir. Mar. 16, 2001). However, we denied the FAA's motion for summary affirmance of *FAA II*, suggesting that it was not clear that the District Court's judgment on *res judicata* was a proper application of that doctrine. Moreover, we directed the parties to address two merits issues in their briefs: (1) whether appellant's request for information pursuant to § 40.37 is governed by FOIA; and (2) what is the proper disposition of appellant's claims for

all other relief (aside from the release of information). We now turn to these questions.

## II. Discussion

### A. Res Judicata

The first issue presented in this appeal is whether the District Court correctly dismissed *FAA II* on *res judicata* grounds. Also known as "claim preclusion," this doctrine holds that "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). Whether two cases implicate the same cause of action turns on whether they share the same "nucleus of facts." *Page v. United States*, 729 F.2d 818, 820 (D.C. Cir. 1984). Thus, under *res judicata*, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (emphasis added).

In this case, the District Court misapplied the claim preclusion doctrine. It is clear that, for the most part, the causes of action asserted in *FAA II* are different from those asserted in *FAA I*. The first case was concerned with the Part 40 regulations as a whole, and the related allegation that the laxity of these regulations may have allowed Delta to violate Drake's rights when it processed his urine sample. In marked contrast, the bulk of *FAA II* attacks the agency's *subsequent* determination that Delta did not violate those regulations and the FAA's refusal to disclose information bearing on that determination. Compl. in Civ. Act. No. 99-2790, at ¶¶ 23-31. Plainly, then, the claims underlying *FAA II* are based on a different nucleus of facts than were those advanced in *FAA I*.

What is particularly noteworthy here is that many of the central events underlying *FAA II* had not even taken place at the time when Drake instigated *FAA I*. While it is not clear from the record when exactly the FAA prepared the investigation report attacked in *FAA II*, it is undisputed that the

agency did not tell Drake about its contents until March 25, 1999. *FAA I*, of course, had been filed months before, on November 12, 1998. Moreover, Drake's claim in *FAA II* that the agency improperly disregarded the terms of 49 C.F.R. § 40.37 plainly arose after his first action began. It was not until April 12, 1999 that the FAA informed Drake that it was treating his request for information as one made under FOIA, thus rejecting his assertion that he was entitled to the information under § 40.37.

Accordingly, the District Court's conclusion that Drake should, or could, have raised these claims in *FAA I* was misguided. *Res judicata* does not preclude claims based on facts not yet in existence at the time of the original action. *Page*, 729 F.2d at 820 & n.12; *see also Stanton v. District of Columbia Court of Appeals*, 127 F.3d 72, 78-79 (D.C. Cir. 1997). So it is here. The doctrine does not bar a litigant from doing in the present what he had no opportunity to do in the past. Therefore, insofar as *FAA II* challenges the nature of the agency's investigation and its refusal to disclose the fruits of that investigation, those claims were improperly dismissed on *res judicata* grounds.

**B. Drake's Request for the Release of Information**

Drake contends that the FAA has provided no reasoned basis for its refusal to apply 49 C.F.R. § 40.37 to his requests for documents gathered or generated during the agency's investigation of Delta. If this regulation does not apply, then the issue is now moot. On May 9, 2000, the FAA informed Drake that because its investigation of Delta was over, FOIA no longer barred the release of the information gathered during that inquiry. Thus, the bulk of what Drake had requested, including the FAA's Enforcement Investigation Report and documentation relating to his 1993 drug test, was released to him.

In light of this disclosure, Drake's claim is moot, unless he can show that § 40.37 entitles him to certain documents that he has requested but not yet received. This he is unable to do, because the FAA reasonably interpreted that regulation as not applying to Drake's requests. The FAA asserts that

Drake's demands for documents based on § 40.37 must fail, because the regulation is addressed to laboratories, not the agency, and, in any event, the regulation is limited to test and laboratory certification results, not agency investigatory materials. Therefore, according to the FAA, Drake was obliged to rely on FOIA, not § 40.37, in his quest for documents from the FAA. We agree.

In the Notice of Proposed Rulemaking ("NPRM") issued to amend Part 40, the FAA indicated that the existing regulations "require[ ] *laboratories* to provide certain information about, among other things, their HHS certifications." *Procedures for Transportation Workplace Drug and Alcohol Testing Programs*, 64 Fed. Reg. 69,076, 69,085 (Dec. 9, 1999) (emphasis added). This suggested that any disclosure obligation imposed by § 40.37 was on the laboratories that conducted the actual drug testing, or on the employers for whom the tests were conducted, not the FAA. Neither the NPRM nor the rule itself states that an employee may rely on § 40.37 to obtain information amassed by the FAA in the course of its investigation of a carrier or laboratory. Moreover, since the NPRM was aimed at "laboratories," this suggested that the regulation applied only to laboratory results and not to documents relating to FAA investigations of carriers.

This interpretation of the regulation was never expressly advanced by the FAA when it rejected Drake's request for documents. Agency officials merely advised Drake that he was bound to use FOIA, not § 40.37, in his quest for documents. Drake also points out that § 40.37 does not expressly foreclose his claim and, further, that the regulation can be plausibly read to support his position. We agree with Drake that the regulation, on its face, is ambiguous. However, this is not fatal to FAA's position. Recent decisions of this court make it clear that we owe deference to an agency's interpretation advanced during litigation regarding the meaning of an ambiguous regulation, if the position is not inconsistent with the agency's prior statements and actions regarding the disputed regulation. *See Bigelow v. Dep't of Defense*, 217 F.3d 875, 878 (D.C. Cir. 2000); *Akzo Nobel Salt, Inc. v. Fed.*

*Mine Safety and Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000). The FAA's interpretation here is consistent with the position the agency took in its NPRM and offers a perfectly reasonable interpretation of § 40.37, one to which we defer.

In support of its interpretation, the FAA first points to § 40.1. This provision provides that Part 40 "applies to transportation employers (including self-employed individuals) conducting drug urine testing programs pursuant to regulations issued by agencies of the Department of Transportation and to such transportation employers' officers, employees, agents and contractors." Thus, according to the FAA, the mandate of § 40.37 – like the rest of Part 40 – was directed to regulated carriers, such as Delta, and not to the FAA itself. *See* Br. of Appellee 19. The agency finds further support for this view in § 40.37's title, which refers only to "test and laboratory certification results." The FAA claims that information generated during an agency investigation of the kind mounted by the FAA here does not fit within the confines of this title. *See id.* at 18.

We accede to this interpretation of § 40.37. The Supreme Court's seminal decision in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), established the basic principle that an agency's interpretation of one of its own regulations commands substantial judicial deference. That interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414. More recently, in *Auer v. Robbins*, the Court held that such deference is not to be withheld merely because the agency's reading of the regulation comes in form of a legal brief. *See* 519 U.S. 452, 462 (1997); *see also Nat'l Wildlife Federation v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997) ("The mere fact that an agency offers its interpretation in the course of litigation does not automatically preclude deference to the agency.").

There are at least three preconditions for applying this so-called *Auer* deference. First, the language of the regulation in question must be ambiguous, lest a substantively new rule

be promulgated under the guise of interpretation. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000). Second, there must be "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462; *see also Bigelow*, 217 F.3d at 878. Finally, the agency's reading of its regulation must be fairly supported by the text of the regulation itself, so as to ensure that adequate notice of that interpretation is contained within the rule itself. *See Auer*, 519 U.S. at 461.

There is no doubt that § 40.37 is ambiguous in its reach. And the interpretation advanced by the FAA, which applies the rule only to test or laboratory certification results, and not to requests presented to the agency itself, resolves that underlying ambiguity quite sensibly. The phrase "relating to his or her drug test" is plastic, and can plausibly be read either narrowly, particularly in light of the provision's title, or broadly, as referring to any records bearing on or connected to a drug test. By focusing on the title to determine the scope of the text, the FAA has adopted a reasonable construction.

The regulation is silent on the question of to whom the employee may present a "written request" in order to gain access to his or her testing records. It is not inconsistent with the provision – and actually quite consistent with the structure of the Part 40 regulations as a whole – to construe this silence as the agency has now done. Part 40 imposes obligations on regulated carriers and affiliated laboratories, not on the FAA itself. These are the entities that actually conduct the drug testing, and who therefore would generally maintain records relating to such tests. It therefore makes perfect sense to read § 40.37 to allow employees to seek such information from private entities.

Accordingly, the interpretation of the regulation advanced by the FAA during this litigation is controlling unless we discern some reason to believe that it is not "fair and considered." In conducting this inquiry, we consider whether the agency has "ever adopted a different interpretation of the

regulation or contradicted its position on appeal." *National Wildlife*, 127 F.3d at 1129. Where the agency's litigation position is consistent with its past statements and actions, there is good reason for the court to defer, for then the position seems "simply to articulate an explanation of long-standing agency practice." *Akzo Nobel*, 212 F.3d at 1304; *see also Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1252 (D.C. Cir. 1998) (distinguishing between explanations of a rationale implicitly adopted by the agency in its prior actions and explanations that offer new explanations for conduct previously defended on other grounds).

So it is here. The FAA's litigation position that § 40.37 applies neither to the FAA nor to documents relating to FAA investigations of carriers is in accord with the agency's handling of Drake's information requests solely under FOIA and treating the Part 40 rules as irrelevant. The FAA did not vacillate or reverse itself on this point. *See Akzo Nobel*, 212 F.3d at 1304-05 (concluding that the "flip-flops here mark the Secretary's position as the sort of '*post hoc* rationalizations' to which courts will not defer") (quoting *Martin v. OSHRC*, 499 U.S. 144, 156 (1991)). Furthermore, Drake can point to no prior situations during which the FAA has followed a practice different from the one it has invoked in this case. *See Bigelow*, 217 F.3d at 878 (deferring where there were "no past practices or pronouncements" inconsistent with agency's "current interpretation"). And, finally, as noted above, the FAA's litigation position finds support in the NPRM issued to amend Part 40.

Accordingly, we have no reason to believe that the FAA's reading of § 40.37 represents anything but its fair and considered understanding. Deferring to that reasonable interpretation, we find that § 40.37 does not apply to Drake's request for documents, and that accordingly his claim is moot.

### C. Drake's Remaining Claims

The District Court invoked sovereign immunity to support its dismissal of the remainder of Drake's action. Drake contends that this was error, arguing that the court instead should have viewed his *pro se* allegations as three separate

claims each of which survives the Government's 12(b)(6) motion. We address each of these claims in turn.

1. *APA Claim*

Drake claims that the FAA's decision not to find Delta in violation of the agency's Part 40 rules violated the APA. In other words, according to Drake, Delta so manifestly disobeyed the FAA's regulations in processing Drake's urine sample that the FAA abused its discretion in concluding otherwise.

The agency's actions in this context were governed by 49 U.S.C. § 46101. Under this provision, any person may file a complaint with the FAA asserting a violation of one of the agency's regulations. The agency is directed to look into the matter "if a reasonable ground appears to the Secretary [of Transportation] or Administrator [of the FAA] for the investigation." § 46101(a)(1). Here, Drake filed such a complaint against Delta, and the FAA conducted an investigation. What happened next falls within the ambit of § 46101(a)(3), which provides that:

> The Secretary of Transportation or Administrator may dismiss a complaint without a hearing when the Secretary or Administrator is *of the opinion* that the complaint does not state facts that warrant an investigation or action.

(Emphasis added.) It is this dismissal that Drake now seeks to challenge. We reject this challenge, because we find that the FAA's decision to dismiss Drake's complaint without a hearing is "committed to agency discretion by law," and thus excluded from review under the APA. 5 U.S.C. § 701(a)(2).

While the APA embodies a "basic presumption of judicial review," *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), § 701(a)(2) bars judicial review of agency action when the matter in dispute has been "committed to agency discretion by law." The Supreme Court's first significant discussion of § 701(a)(2) came in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). There, the Court indicated that this is a "very narrow exception," which applies only "in those rare instances where 'statutes are drawn in such broad

terms that in a given case there is no law to apply.'" *Id.* at 410 (quoting S. REP. No. 79-752 (1945)).

Since the Court's decision in *Overton Park*, the "no law to apply" formula has come to refer to the search for substantive legal criteria against which an agency's conduct can be seriously evaluated. If no such "judicially manageable standards" are discernable, meaningful judicial review is impossible, and agency action is shielded from the scrutiny of the courts. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *Webster v. Doe*, 486 U.S. 592, 599-600 (1988). In such circumstances, the courts have no legal norms pursuant to which to evaluate the challenged action, and thus no concrete limitations to impose on the agency's exercise of discretion. In other words, § 701(a)(2) encodes the principle that an agency cannot abuse its discretion, and thus violate § 706(2)(A), where its governing statute confers such broad discretion as to essentially rule out the possibility of abuse.

In determining whether a matter has been committed solely to agency discretion, we consider both the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards for reviewing that action. *See, e.g., Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 104 F.3d 1349, 1353 (D.C. Cir. 1997). The Supreme Court has recognized that certain categories of administrative decisions, including refusals to take enforcement actions, are presumptively outside the bounds of judicial review. *See Chaney*, 470 U.S. at 831-34; *see also Lincoln v. Vigil*, 508 U.S. 182, 191 (1993).

In the present case, the FAA's decision to dismiss Drake's complaint without a hearing was equivalent to a decision not to commence an enforcement action. Such a hearing is a prerequisite to an FAA finding that a carrier has committed a statutory or regulatory violation. *See* 49 U.S.C. § 46101(a)(4). Here, the agency determined that no hearing was necessary because the facts stated in Drake's complaint were insufficient to warrant further action. The FAA's action in this case was thus analogous to an exercise of "prosecutori-

al discretion" of the sort discussed in *Chaney*. And, as *Chaney* makes clear, when prosecutorial discretion is at issue, the matter is presumptively committed to agency discretion by law. *See Block v. SEC*, 50 F.3d 1078, 1082 (D.C. Cir. 1995) (concluding that an agency's refusal to hold a hearing for the purpose of establishing the factual basis for subsequent enforcement action is subject to *Chaney*'s presumption against judicial review).

In an effort to avoid *Chaney*'s presumption against judicial review, Drake argues that he is merely challenging the *specific findings* of the FAA that led the agency not to commence an enforcement action. In other words, Drake contends that there is "law to apply" in the sense indicated by the Supreme Court in *Overton Park*, because the agency made specific findings to support its judgment and these findings are subject to review under § 706(2)(A) of the APA. This is a superficially appealing argument, but it ultimately fails for two related reasons.

First, it is clear that the FAA's factual findings were inextricably intertwined with its decision not to issue a compliance order against Delta. In other words, the FAA's decision that the facts did not show a violation of Part 40 was inseparable from its decision to take no further prosecutorial action against the carrier. This is not to suggest that such agency findings are never subject to judicial review. Instead, our point is that when, as here, such determinations are a prerequisite to an enforcement action, we would read *Chaney* far too narrowly to conclude that a challenge to the adequacy of agency findings is not in substance a challenge to the agency's refusal to enforce. *See Block*, 50 F.3d at 1081 (suggesting that *Chaney* applies not merely to an agency's decision not to commence enforcement action in the case of a recognized violation, but also to "its antecedent judgment upon the question of whether a violation has occurred") (internal quotation marks omitted).

Second, whether this case is governed by *Overton Park* ("no law to apply" so the presumption of reviewability is lost) or *Chaney* (agency action involved an exercise of prosecutori-

al discretion and presumption of non-reviewability has not been overcome), Drake cannot prevail. This is so because, in the end analysis, the statute at issue gives virtually unfettered discretion to the FAA to act as it did in this case.

*Chaney*'s presumption against judicial review may be rebutted where the relevant statute supplies meaningful standards to cabin the agency's otherwise plenary discretion. *See Chaney*, 470 U.S. at 832-33; *see also Vigil*, 508 U.S. at 193 ("Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes...."); *Block*, 50 F.3d at 1082 (noting that "an enforcement decision that would otherwise be unreviewable is subject to judicial review if the Congress or the agency itself has provided a meaningful standard for the agency to follow in exercising its enforcement power"). Accordingly, we may review the FAA decisions challenged by Drake only if the operative statute provides clear guidelines by which to do so, or otherwise evinces an intent to constrain the FAA's discretion.

In this case, however, the statute does just the opposite. The language of § 46101(a)(3), which set the terms for the FAA's decision to dismiss Drake's complaint without a hearing, is highly discretionary. Indeed, a provision that allows the Administrator to act when she "*is of the opinion* that the complaint does not state facts that warrant an investigation," gives the FAA virtually unbridled discretion over such decisions. The only statutory reference point is the Administrator's own beliefs. Therefore, a court has no meaningful standard against which to judge the agency's exercise of discretion, at least so long as the agency's action does not otherwise infringe some constitutional right or protection. *See Webster*, 486 U.S. at 603-04.

The Supreme Court has relied on an analogous distinction between a subjective standard (whether the agency thinks that a condition has been met) and an objective one (whether the condition in fact has been met) in deciding that agency action was unreviewable. In *Webster*, the Court held that a provision allowing termination of a CIA employee whenever

the agency's Director "shall *deem* such termination necessary or advisable in the interests of the United States" precluded judicial review of that decision. *Id.* at 600 (quoting 50 U.S.C. § 403(c)). What may be *thought* necessary may not in fact *be* necessary, but a court may pass judgment only on the latter, not the former.

Thus, whether this case involves a presumption of non-reviewability under *Chaney* or, instead, a presumption of reviewability under *Overton Park*, Drake's claim still fails because there is "no law to apply." *See, e.g., Claybrook v. Slater*, 111 F.3d 904, 908-09 (D.C. Cir. 1997) (decision of agency representative to adjourn a meeting whenever "he *determines* it to be in the public interest" was committed to agency discretion by law) (emphasis added). In sum, then, it is clear that the relevant statutory language "fairly exudes deference" to the FAA, and "foreclose[s] the application of any meaningful judicial standard of review." *Webster*, 486 U.S. at 600. We therefore have no basis upon which to review the FAA's decision to dismiss Drake's complaint without a hearing. Appellant has therefore failed to state a claim under the APA.

2. Bivens *Claim*

We need not linger long over Drake's argument that his complaint states a colorable *Bivens* claim. The complaint names only the FAA itself as defendant. Drake neither named nor served any individual defendants. It is of course well-settled that *Bivens* liability cannot be imposed on an agency of the Federal Government. *See FDIC v. Meyer*, 510 U.S. 471 (1994). Drake's constitutional claim against the FAA thus fails.

Aware of this problem, amicus asks us to allow Drake to correct this pleading deficiency on remand. Because we have rejected all of appellant's claims, however, there is nothing to remand. Insofar as we are being asked to send the case back merely so that Drake may amend his complaint, this request comes too late. *See Gov't of Guam v. Am. President Lines,*

28 F.3d 142, 149-51 (D.C. Cir. 1994) (holding that plaintiffs whose complaints are dismissed waive their right to amend following appeal if they failed to seek leave to amend from the District Court); *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 552-53 (D.C. Cir. 2002) (confirming that this rule applies so long as the Court of Appeals *affirms* the dismissal of the complaint).

3. *FTCA Claim*

Finally, we reject Drake's complaint resting on the Federal Tort Claims Act. By its own terms, the FTCA does not apply to any claim that is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency . . . whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). As our discussion of appellant's APA claim has demonstrated, the FAA's decision to dismiss Drake's complaint without a hearing in light of its finding that Delta did not violate Part 40 plainly represents an exercise of the agency's discretion. Accordingly, the District Court's decision that Drake stated no claim under the FTCA was entirely correct.

Drake argues that the FAA's governing statute contains certain mandatory elements that, if disregarded, could serve as the basis for an FTCA action. Specifically, he points to the provision mandating that the Administrator "*shall* issue an order to compel compliance with this part if the Secretary or Administrator finds in an investigation under this subsection that a person is violating this part." 49 U.S.C. § 46101(a)(4) (emphasis added). We have no occasion to address whether disobeying such a statutory command could give rise to FTCA liability, because there has been no such disobedience in this case. The whole basis for Drake's complaint is that the FAA did *not* find a violation. Accordingly, whatever obligations this statutory scheme may impose on the FAA simply have not been triggered.

## III. CONCLUSION

For the reasons given above, the decision of the District Court is affirmed.

*It is so ordered.*

# APPENDIX B

**APPENDIX B**

**UNITED STATES COURT OF APPEALS**
For The District Of Columbia Circuit

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No. 00-5329 September Term, 2000
99cv02790

---

Richard Drake
Appellant

v.

Federal Aviation Administration
Appellee

---

BEFORE: Sentelle, Rogers, and Tatel, Circuit Judges

**ORDER**
(filed Aug 15 2001)

Upon consideration of the motion for summary affirmance, the response thereto,filed May 1, 2001, also containing appellant's reply in support of motins for summary reversal, to allow discovery, and to bar dispositive motions; the motion for summary reversal and the response thereto (styled "reply"); the court's order filed March 21, 2001, deferring consideration of the motion for discovery until further order of the court; the renewed motion for discovery filed April 20, 20011; the motion for a conference; and the motion to bar any dispositive motions by appellee, and the combined response to the procedural motions, it is

**ORDERED** That the motions for discovery be denied. It is

**FURTHER ORDERED** that the motion for conference be denied. It is

**FURTHER ORDERED** that the motion to bar any dispositive motions by appellee be denied. Appellees are under no obligation to file dispositive motions, and the Federal Aviation Administration did not file such motion by the November 6, 2000 deadline set by the court's September 22, 2000 order. By the time appellant moved for summary reversal, the case had been placed in abeyance, thus obviating the need for the appellee to respond to appellant's motion at that point. The court's abeyance order filed December 12, 2000, directed the parties to file motions to govern following the disposition of No. 00-5328. Both parties acted in accordance with that directive in filing the motions for summary disposition now before the court. It is

**FURTHER ORDERED** that the motion for summary reversal and the motion for summary affirmance be denied for the reasons stated in the attached memorandum. The merits of the parties' positions are not so clear as to warrant summary action. See Taxpayers Watchdog, Inc. V. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (Per curiam), cert. Denied, 449 U.S. 994 (1980). It is

**FURTHER ORDERED,** on the court's own motion, that

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a member of the Bar of this court, be appointed as amicus curiae to present arguments in favor of appellant's position.

Because the court has determined that summary disposition is not in order, the Clerk is instructed to calender this case for presentation to a merits panel.

**Per Curiam**

RWR
RT
TBS

**UNITED STATES COURT OF APPEALS**
For The District Of Columbia Circuit

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No. 00-5329 September Term, 2001
99cv02790

---

Richard Drake
Appellant

v.

Federal Aviation Administration
Appellee

---

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland,Circuit Judges

**ORDER**
(filed on, July 22, 2002)

Upon consideration of appellant's petition for rehearing in banc, and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the petition be denied.

Per curiam

**FOR THE COURT:**
Mark J. Langer, Clerk
By: Michael C. McGrail, Deputy Clerk

# APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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August Term, 1997

(Argued: May 14, 1998 Decided: June 17, 1998)

Docket No. 97-9039

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RICHARD W. DRAKE,

*Plaintiff-Appellant,*

—v.—

DELTA AIR LINES, INC.,

*Defendant-Appellee.*

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Before:

FEINBERG, CARDAMONE, and CABRANES,

*Circuit Judges.*

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Appeal from judgments of the United States District Court for the Eastern District of New York (Frederic Block, *Judge*) dismissing plaintiff's complaint, which alleged violations of Federal Aviation Administration regulations, Fourth Amendment violations, and wrongful termination in connection with

employee drug testing by Delta Air Lines, for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

Affirmed in part with respect to appellant's regulatory and wrongful termination claims, vacated in part with respect to appellant's Fourth Amendment claims, and remanded.

---

RICHARD W. DRAKE, *pro se*, Manassas, Vermont.

IRA G. ROSENSTEIN, Orrick, Herrington & Sutcliffe, New York, New York (Michael Delikat, Robert S. Whitman, Orrick, Herrington & Sutcliffe; Thomas J. Munger, Andrew J. Fisher, Delta Air Lines, Inc., on the brief), *for Defendant-Appellee*.

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PER CURIAM:

Plaintiff-appellant Richard W. Drake appeals from the judgment of the United States District Court for the Eastern District of New York (Frederic Block, *Judge*) of April 26, 1996 dismissing for failure to state a claim those portions of his complaint alleging violations by defendant-appellee Delta Air Lines, Inc. ("Delta") of Federal Aviation Administration ("FAA") regulations and of Drake's Fourth Amendment rights, *see Drake v. Delta Air Lines, Inc.*, 923 F. Supp. 387 (E.D.N.Y. 1996) ("*Drake I*"), and from the July 28, 1997 final judgment of that same court dismissing for failure to state a claim his amended complaint alleging wrongful termination and procedural due process violations in connection with his termination, *see Drake v. Delta Air Lines, Inc.*, 1997 WL 397498 (E.D.N.Y. July 10, 1997) ("*Drake II*"). Substantially for the reasons stated in the opinions below, we

affirm the judgments of the district court in all respects but one; we vacate the judgment of the district court with respect to Drake's Fourth Amendment claims (which, construed liberally, contain allegations overlooked by the district court) and remand for further proceedings.

I.

Taking the facts alleged in plaintiff's pleadings[1] as true, as we must in reviewing a dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6), *see Murray v. Miner*, 74 F.3d 402, 403-04 (2d Cir. 1996), Drake claims the following: He was employed by Delta as a flight attendant beginning in 1991. He was tested for drugs four times between April 1993 and October 28, 1993. On October 28, 1993, Drake was required to provide a urine sample for a drug test. On November 10, 1993, he was told that there was "something wrong with his [October 28] sample," but was never supplied with written results of the drug test. He was removed from flight status and suspended on November 28, 1993, and one month later he was asked to resign; when he refused to do so, his employment was terminated. Drake was informed in February 1994 that a Delta administrative hearing (in which he had not been permitted to personally participate) had confirmed his termination.

With respect to the October 28, 1993 drug test, the first laboratory to which Drake's urine sample was sent found the sample to be "unsuitable for testing." The sample was then sent to a second laboratory to determine if it had been adulterated with a substance designed to prevent the detection of

[1] Like the district court, we deem Drake's complaint to include the facts contained in his memorandum of law filed in response to Delta's 1996 motion to dismiss. *See Drake I*, 923 F. Supp. at 388 (citing *Le Grand v. Evan*, 702 F.2d 415, 416 n.3 (2d Cir. 1983)).

illegal drugs. (Delta states, but did not supply Drake with documentation indicating, that the second test established that the sample had in fact been adulterated.) Drake contends that Delta's procedures in connection with both the original test and the subsequent test for adulterants involved multiple violations of FAA drug testing regulations, *see* 14 C.F.R. pt. 121, app. I (adopting procedures specified in 49 C.F.R. pt. 40).

II.

We affirm, substantially for the reasons stated in its thoughtful and detailed opinions below, the district court's dismissal under Fed. R. Civ. P. 12(b)(6) of (i) Drake's claims based on Delta's alleged violations of drug testing regulations, because there is no implied private right of action for employees under those regulations,[2] *see Drake I*, 923 F. Supp. at 389-393; and (ii) Drake's statutory, common law, and constitutional claims based on Delta's allegedly wrongful termination of his employment because, *inter alia*, Drake was an at-will employee and Delta was not a state actor with respect to the employment action, *see Drake II*, 1997 WL 397498, at *2-*4.

The district court's analysis of Delta's alleged Fourth Amendment violations, however, rests on a key assumption about the nature of Drake's complaint that is colorably challenged on appeal—namely, the assumption that Drake took issue with only the *second* test of his October 28, 1998 urine sample. *See Drake I*, 923 F. Supp. at 394 ("Drake, however, does not take issue with the initial test, but rather, challenges

[2] We note, as did the district court, that Drake could have sought redress of the alleged regulatory violations through administrative avenues, such as by filing a complaint with the Secretary of Transportation. *See Drake I*, 923 F. Supp. at 393 n 9 (citing 49 U.S.C. § 46101(a)).

Delta's subsequent test for adulteration."). Having concluded that the Fourth Amendment was implicated in the second test, the district court held that the test was nevertheless a "reasonable" intrusion on Drake's Fourth Amendment interests. That conclusion of "reasonableness" rested in large part on the reasoning that "[t]o the extent that Drake retained any privacy interest in his urine sample after it had been tested the first time"—the propriety of which test the district court took to be unchallenged—"that interest was minimal." *Id.* at 396. More specifically, the district court noted that the second test did not involve any additional physical invasion beyond that already occasioned by the original test. *See id.* at 396-97.

On appeal, however, Drake objects to the district court's characterization of his complaint, and contends that he did indeed challenge the original test as well. It is certainly the case that Drake's papers before the district court focused principally, and indeed overwhelmingly, on his assorted objections to Delta's procedures in connection with the second test for adulterants. In light of the rather impenetrable state of some of Drake's pleadings, it is understandable that the district court—which was commendably conscientious in construing and resolving his claims—would have read the complaint as it did. However, Drake now points to a portion of his *pro se* complaint that, when construed liberally, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972), can be read to take issue with the original drug test as well. *See* Plaintiff's Complaint (Dec. 27, 1994) at 2 ("Delta Air Lines violated the Plaintiff's right that drug testing be done on a 'RANDOM' basis. Delta Air Lines manipulated the random DOT testing for [its] own agenda which made the testing not random, but intentionally oppressive and discriminatory.")

If Drake's complaint is construed to raise objections not only to the second test for adulterants, but also to the

original drug test itself, we cannot say that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Northrop v. Hoffman of Simsbury*, 134 F.3d 41, 44 (2d Cir. 1997). Taking Drake's allegations (liberally construed) as true for purposes of the motion to dismiss, he has pled a legally cognizable claim for violation of the Fourth Amendment. Although the Fourth Amendment prohibits only "unreasonable" searches and seizures,[3] *see Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 619 (1989), Drake's allegation that the October 28, 1993 test was not randomly administered is sufficient to make out a *prima facie* claim of unreasonableness. Warrantless drug urinalysis testing of employees in safety-sensitive jobs may be consonant with the Fourth Amendment where part of a systematic, uniformly applied testing program (such as random testing), *see Skinner*, 489 U.S. at 624; *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989), or where based on the employer's individualized "reasonable suspicion" of drug use by the employee, *see Coppinger v. Metro-North Commuter R.R.*, 861 F.2d 33, 35-36 (2d Cir. 1988). *See also Benavidez v. City of Albuquerque*, 101 F.3d 620, 624 (10th Cir. 1996); *Ford v. Dowd*, 931 F.2d 1286, 1290-92 (8th Cir. 1991); *Fraternal Order of Police, Lodge No. 5 v. Tucker*, 868 F.2d 74, 77 (3d Cir. 1989). However, Drake's complaint can be construed to allege that Delta's collection and first test of his urine sample was not administered within the parameters of its systematic testing program, and the record is silent (as is Delta) as to any basis,

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[3] As the district court noted, *see Drake I*, 923 F. Supp. at 394, and as counsel for Delta conceded several times at oral argument before this Court, the sample collection and initial drug test, which were carried out under the authority of the FAA mandatory drug testing regulations, implicated the Fourth Amendment; that is, Delta was a "state actor" for Fourth Amendment purposes when it required Drake to submit to the October 28, 1993 test.

arising prior to the test's administration, for a reasonable suspicion that Drake was using drugs.

Whether or not the October 28, 1993 collection and testing of Drake's urine sample was conducted as part of Delta's systematic, FAA-mandated, random drug testing program, and whether or not Delta possessed any reasonable suspicion of Drake, are factual questions to be taken up on summary judgment or at trial. In reviewing the dismissal on the pleadings, however—where we are required to construe liberally Drake's complaint, accept as true his allegations, and draw all reasonable inferences in his favor—we cannot conclude that Drake has failed to state a facially cognizable claim of a Fourth Amendment violation in connection with the original drug test. Additionally, because Drake has stated a claim with respect to the original sample collection and testing, he has also stated a Fourth Amendment claim with respect to the further testing for adulterants of that allegedly unconstitutionally obtained sample.

Accordingly, while affirming in all other respects, we vacate the judgment of the district court insofar as it dismissed Drake's Fourth Amendment claims under Fed. R. Civ. P. 12(b)(6), and we remand for further proceedings in connection with those claims. On remand, the district court might wish to consider whether Drake's action merits the appointment of counsel under its local procedures governing the appointment of attorneys in *pro se* civil actions.